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No. 00-1693

In the Supreme Court of the United States

AMADO A. MIRANDA AND ESPERANZA MIRANDA,
PETITIONERS

v.

JOHN D. ASHCROFT, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the district court lacked jurisdiction over petitioner Amado Miranda's constitutional challenge to his final removal order because he had already been removed from the United States and therefore did not satisfy the provision of the general federal habeas corpus statute, 28 U.S.C. 2241, that habeas corpus relief may be granted only to a habeas petitioner who is "in custody."

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 238 F.3d 1156. The decision of the district court (Pet. App. 8a-13a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 7, 2001. The petition for a writ of certiorari was filed on May 8, 2001.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] While the certiorari petition was pending in this Court, and after the time for filing a petition for rehearing en banc in the court of appeals had expired, the court of appeals *sua sponte* requested the parties to address whether rehearing en banc should be

STATEMENT

1. Petitioner Amado Miranda is a native and citizen of Mexico who entered the United States as a lawful permanent resident (LPR) in 1970.[2] Pet. App. 9a; C.A. App. 74. In 1983, petitioner was convicted in California state court, upon a guilty plea, to committing a lewd act upon a child. He received a suspended sentence of 120 days in jail for that offense. Pet. App. 9a; C.A. App. 75.

On September 30, 1996, Congress enacted into law the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 *et seq.* In IIRIRA, Congress expanded the definition of the term "aggravated felony" in the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, to include "sexual abuse of a minor." See IIRIRA § 321(a)(1), 110 Stat. 3009-627; 8 U.S.C. 1101(a)(43)(A) (Supp. V 1999). Congress further provided that the expanded definition of "aggravated felony" would apply to all convictions falling within its terms, regardless of whether the conviction was entered before, on, or after the date of IIRIRA's enactment. See IIRIRA § 321(b), 110 Stat. 3009-628. Accordingly, by operation of IIRIRA, petitioner's state-court conviction became a conviction for an aggravated felony. Under the INA, an alien who is convicted of an aggravated felony at any time after his

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granted. After the parties made submissions to the court of appeals on that question, the court of appeals denied rehearing and rehearing en banc on August 27, 2001.

[2] Esperanza Miranda, a United States citizen who is the wife of Amado Miranda, is also named as a petitioner in the certiorari petition and was a party to some of the proceedings below. Esperanza Miranda's claims, however, appear to be merely derivative of those of Amado Miranda. We therefore refer to Amado Miranda as "petitioner" in this brief.

admission to the United States is deportable, 8 U.S.C. 1227(a)(2)(A)(iii) (Supp. V 1999), and is ineligible for discretionary cancellation of removal, 8 U.S.C. 1229b(a)(3) (Supp. V 1999).

On October 1, 1998, the Immigration and Naturalization Service (INS) issued a Notice to Appear (NOA), charging petitioner with being removable from the United States as an alien convicted of an aggravated felony. Pet. App. 9a; C.A. App. 78. On October 19, 1998, at a hearing before an immigration judge (IJ), petitioner, represented by counsel, conceded that he was removable and did not apply for relief from removal. Pet. App. 3a, 9a; C.A. App. 24. The IJ sustained the charge of removability in the NOA and ordered petitioner removed to Mexico. Petitioner waived his right to appeal to the Board of Immigration Appeals (BIA) and was removed to Mexico on the same day. C.A. App. 24.

2. On February 25, 1999, petitioner, through new counsel, filed a complaint in the United States District Court for the Southern District of California, challenging his removal order on the asserted ground that IIRIRA's expansion of the definition of "aggravated felony" was unconstitutionally retroactive as applied to his case. See Pet. App. 10a; C.A. App. 13-22, 33-46. The government moved for dismissal, arguing, among other things, that the district court had no authority to issue the writ of habeas corpus in petitioner's case because, after the execution of petitioner's removal order, petitioner was not "in custody" within the meaning of the

federal habeas corpus statute, 28 U.S.C. 2241(c).[3] C.A. App. 65-73, 93-95.

The district court dismissed the case for lack of jurisdiction. Pet. App. 8a-13a. As pertinent here, the court ruled that petitioner was not "in custody" because he did not file his petition for a writ of habeas corpus until after he had been removed from the United States, and so the court "lacked jurisdiction over [his] petition from the moment it was filed." *Id.* at 12a.

3. The court of appeals affirmed the dismissal of the petition for lack of jurisdiction. Pet. App. 1a-7a. The court held that petitioner "cannot avail himself of habeas corpus jurisdiction because he has already been removed and therefore is no longer 'in custody.'" *Id.* at

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[3] Section 2241(c) provides:

> The writ of habeas corpus shall not extend to a prisoner unless—
>
> (1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or
>
> (2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States; or
>
> (4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or
>
> (5) It is necessary to bring him into court to testify or for trial.

5a. The court observed that the custody requirement of habeas corpus jurisdiction has been extended to reach "individuals who, though not subject to immediate physical imprisonment, are subject to restraints not shared by the public generally that significantly confine and restrain their freedom." *Ibid.* (internal quotation marks and brackets omitted). Nonetheless, it stressed, the custody element has not been construed to reach an individual, such as petitioner, who is "*not* subject to restraints not shared by the public generally that significantly confine and restrain his freedom." *Id.* at 6a (emphasis added). Petitioner, the court noted, "is subject to no greater restraint than any other non-citizen living outside American borders." *Ibid.* Accordingly, "[n]o interpretation of § 2241 that is not utterly at war with its plain language permits [the court] to exercise habeas corpus over [petitioner's] claims." *Ibid.*

The court also concluded that the district court could not exercise jurisdiction over petitioner's claims under the general federal question statute, 28 U.S.C. 1331. As the court stated the matter, "[i]n IIRIRA, * * * Congress expressly stripped the federal courts of jurisdiction to review final orders of removal such as [petitioner's]." Pet. App. 7a (citing 8 U.S.C. 1252(a)(2)(C) (Supp. V 1999)).

ARGUMENT

The court of appeals correctly concluded that the district court lacked habeas corpus jurisdiction over petitioner's challenge to his removal order because petitioner is not "in custody" within the meaning of the habeas corpus statute. That decision does not conflict with any decision of this Court or any other court of appeals. The court of appeals also correctly ruled that the district court lacked jurisdiction over that challenge

under 28 U.S.C. 1331. Further review is therefore not warranted.

1. "The federal habeas statute gives the United States district courts jurisdiction to entertain petitions for habeas relief only from persons who are '*in custody*[.]'" *Maleng* v. *Cook*, 490 U.S. 488, 490 (1989); see *Carafas* v. *LaVallee*, 391 U.S. 234, 238 (1968). The Court has construed the "in custody" requirement broadly, to authorize jurisdiction over a habeas corpus petition even when the petitioner is not physically confined. See *Maleng*, 490 U.S. at 491. Nonetheless, the Court has always insisted that a habeas petitioner must be under some current, actual restraint on his liberty to be "in custody" within the meaning of the habeas corpus statute. See *id.* at 492. It is not sufficient, to establish habeas corpus jurisdiction, that the petitioner may suffer adverse collateral consequences flowing from the order under challenge (*ibid.*); rather, the petitioner must show that his freedom is actually constrained in a way "not shared by the public generally." *Jones* v. *Cunningham*, 371 U.S. 236, 240 (1963).

Petitioner cannot make that showing in this case. Petitioner has not asserted that he is under any current, actual restraint in Mexico that is attributable to United States authorities.[4] From aught that appears in the record, petitioner is free to move about in Mexico as he pleases. No authority of the United States

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[4] Even if petitioner could make such a showing, it is doubtful that the writ of habeas corpus could issue in such a circumstance. See *Johnson* v. *Eisentrager*, 339 U.S. 763, 771 (1950) (holding that an alien detained abroad by U.S. military authorities was not entitled to habeas corpus, and noting that, "in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act").

government constrains him from doing so. It is true that, under the INA, because petitioner has been removed based on his aggravated felony conviction, he is permanently barred from readmission into the United States. See 8 U.S.C. 1182(a)(9)(A)(ii) (Supp. V 1999). That bar on admission into the United States (in the event that petitioner were to apply for admission), however, does not amount to a current restraint on his liberty. It is, at most, a collateral consequence of the removal order against him insufficient to satisfy the custody requirement of habeas corpus jurisdiction. Moreover, the admission of any alien into the United States is subject to extensive regulations and restrictions in the INA; the fact that petitioner does not have an unfettered right to be admitted into the United States does not distinguish his situation from that of the vast majority of noncitizens. And this Court has never suggested that an alien abroad may challenge a prohibition on his entry into the United States by habeas corpus. Cf. *Brownell* v. *Tom We Shung*, 352 U.S. 180, 184 n.3 (1956) (alien abroad may not challenge restriction on entry by declaratory judgment).

Petitioner contends (Pet. 7-10) that the decision below is contrary to the presumption that the federal courts are available to hear constitutional challenges to governmental action, and that he is without a remedy to challenge the constitutionality of Congress's expansion of the definition of "aggravated felony" in 1996. Petitioner had an avenue in federal court, however, to raise that claim. Petitioner could have appealed the IJ's removal order to the BIA and then (assuming the BIA would have rejected his challenge) could have filed either a petition for review in the court of appeals or a habeas corpus petition in district court challenging his final removal order on constitutional grounds.

Petitioner also could have requested a stay of deportation from the court. Under this Court's decision in *INS* v. *St. Cyr*, 121 S. Ct. 2271 (2001), the district court would have had authority under the habeas corpus statute to entertain petitioner's constitutional challenge —at least if, contrary to our position (see note 5, *infra*), the court of appeals concluded that it did not have jurisdiction over petitioner's constitutional challenge. See *id.* at 2282-2283 (reviewing federal courts' authority to answer "questions of law in habeas corpus proceedings brought by aliens").[5]

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[5] This Court's recent decisions in *St. Cyr* and *Calcano-Martinez* v. *INS*, 121 S. Ct. 2268 (2001), do not appear to foreclose the possibility that petitioner could have raised his constitutional challenge to his removal order on direct petition for review in the court of appeals, pursuant to the judicial-review provision of 8 U.S.C. 1252(a) (Supp. V 1999). Section 1252(a)(2)(C) of Title 8 precludes the courts of appeals from reviewing a removal order entered against an alien based on a conviction for an aggravated felony. See 8 U.S.C. 1252(a)(2)(C) (Supp. V 1999); *Calcano-Martinez*, 121 S. Ct. at 2270. As this Court noted in *Calcano*, however, the scope of that preclusion of review "is not without its ambiguities." *Id.* at 2270 n.2. In particular, the government has taken the position that Section 1252(a)(2)(C) does not bar judicial review of substantial constitutional challenges to provisions of the INA. *Ibid.* Section 1252(a)(2)(C) also does not preclude an alien from contesting, on petition for review, that the offense that formed the basis of his removal order was not in fact an aggravated felony. *Ibid.* Petitioner in this case contends that Congress's retroactive expansion of the definition of "aggravated felony" in IIRIRA was unconstitutional as applied to his case. If that challenge is understood as an assertion that petitioner's conviction was not validly classified as an aggravated felony, then the court of appeals would have had jurisdiction to entertain it, had petitioner filed a timely petition for review (which he did not). See 8 U.S.C. 1252(b)(1) (Supp. V 1999) (30-day deadline for petitions for review).

Petitioner's failure to pursue one of those avenues of judicial redress in the appropriate and timely fashion does not provide a reason to avoid application of the "in custody" requirement of the habeas statute in this case. We note as well that under, 8 U.S.C. 1252(d)(1) (Supp. V 1999), petitioner's failure to exhaust his administrative remedies, by seeking review by the BIA of the IJ's removal order, constitutes an independent bar to judicial review on this case.

2. The district court would not have had authority to disregard the "in custody" requirement of the habeas corpus statute by exercising jurisdiction over petitioner's challenge to his removal order under 28 U.S.C. 1331. This Court has made clear that, where the habeas corpus statute, with its carefully designed prerequisites for and restrictions on relief, might apply to provide a detained person with a remedy, that statute "must be understood to be the exclusive remedy available." *Preiser* v. *Rodriguez*, 411 U.S. 475, 489 (1973). Otherwise, it would "wholly frustrate explicit congressional intent" to limit habeas corpus relief to certain defined circumstances if the petitioner could simply apply a different label to his claim for relief or invoke a differ-

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In addition, had petitioner filed a timely petition for review, the fact that he was removed from the United States would not have precluded the court of appeals from ruling on the petition. The judicial-review provision of Section 1252(a) does not contain a jurisdictional "in custody" requirement similar to that of the habeas corpus statute. In removal cases under IIRIRA, the courts of appeals may entertain petitions for review filed by aliens who have been removed. The provision under pre-IIRIRA law precluding judicial review of deportation orders entered against aliens who have been deported, 8 U.S.C. 1105a(c) (1994), was repealed by Section 306(b) of IIRIRA, see 110 Stat. 3009-612, and was not replaced by any similar provision.

ent statutory section number for the district court's jurisdiction. See *id.* at 489-490. Here, Congress has carefully limited the availability of the writ of habeas corpus to circumstances where the detained person is in custody—in conformity with the terms of the Great Writ. See *Carafas*, 391 U.S. at 238. The district court does not have authority to disregard that explicit congressional restriction on habeas corpus relief by exercising its general federal question jurisdiction.

Moreover, the INA itself contains its own prelusions of review that would bar an action for judicial review of a final removal order in district court based on general federal question jurisdiction. See 8 U.S.C. 1252(a)(1) and 1252(b)(1) (Supp. V 1999). Although the Court held in *St. Cyr* that those prelusions of review did not bar the exercise of habeas corpus jurisdiction to consider a pure question of law where review could not be had in the court of appeals, the Court did not suggest that those preclusion provisions would be ineffective to bar the exercise of federal question jurisdiction. See 121 S. Ct. at 2285-2287.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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